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Eng Lian Concrete Sdn Bhd v Mustapha bin Nagoor

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HIGH COURT (SEREMBAN) — APPEAL NO NA-12ANCC-1–03 OF 2020
AZIZUL AZMI ADNAN J
26 JANUARY 2021

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Civil Procedure — Striking out — Appeal against order allowing striking out — When does cause of action accrue against guarantor or indemnity provider — Whether appellant's action was barred by limitation — Rules of Court 2012 O 18 r 19(1)(a), (b), and (d)

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This was an appeal against the decision of the sessions court allowing the respondent application to strike out the appellant's claim. The appellant supplied concrete mix to a company known as MBN Consortium Sdn Bhd ('MBN Consortium'). The appellant had obtained a judgment in default in October 2018 for debts due to the appellant for the sale of goods and the judgment remains unsatisfied. The respondent had signed a guarantee and indemnity with the plaintiff in connection to the payment obligations of MBN Consortium. The terms of which, among others, provided that the respondent would indemnify the plaintiff against all liabilities arising from the supply of goods by the plaintiff to MBN Consortium. Having failed to obtain a satisfaction of its judgment against MBN Consortium, the appellant commenced a writ action at the sessions' court against the respondent premised upon the guarantee and indemnity. The outstanding judgment debt together with interest stood at more than RM786,000. The respondent applied to strike out the appellant's claim under O 18 r 19(1)(a), (b) and/or (d) of the Rules of Court 2012 ('the ROC') which was allowed on the basis that limitation had set in. The issues to be determined were: (a) when did the right to sue a surety or indemnity provider accrue; and (b) whether the appellant's claim was barred by the limitation.

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Held, dismissing the appeal with costs:

(1) The accrual of the cause of action of a lender against a guarantor or an indemnity provider depended on the proper construction of the guarantee or indemnity. In the circumstances where the guarantee and/or indemnity was not an on demand guarantee or indemnity and the guarantor or indemnity provider had agreed: (a) for his obligations to be directly owed to the lender as principal debtor; and (b) for his obligations to be co-extensive with those of the borrower, the cause of action against

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the guarantor or indemnity provider accrues simultaneously with the cause of action against the borrower (see paras 9 & 13).

(2) If the guarantee or indemnity was expressed to be contingent upon a demand being made, and there was no contractual stipulation for the obligations under the guarantee or indemnity to be co-extensive with the obligations of the borrower, the cause of action would only accrue when a demand had been made against the guarantor or indemnity provider (see para 14).

(3) The defendant had agreed to be liable to the plaintiff as though he were a principal debtor to the plaintiff, and he had also agreed that his liability to the plaintiff would be co-extensive with the liability of MBN Consortium to the plaintiff. When the defendant's liability was expressed to be co-extensive with that of MBN Consortium, this meant that the period of limitation applicable to both the borrower's and MBN Consortium's liabilities would be identical (see para 18).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan mahkamah sesyen yang membenarkan permohonan responden untuk membatalkan tuntutan perayu. Perayu membekalkan campuran konkrit kepada satu syarikat yang dikenali sebagai MBN Consortium Sdn Bhd ('MBN Consortium'). Perayu telah mendapatkan penghakiman ingkar pada Oktober 2018 untuk jumlah terhutang kepada perayu untuk jualan barangan tersebut dan penghakiman tersebut masih belum dipenuhi. Responden telah menandatangani jaminan dan indemniti dengan plaintif berkaitan dengan tanggungjawab bayaran MBN Consortium. Termanya adalah, antara lain, memperuntukkan bahawa responden akan memberikan indemniti kepada plaintif terhadap semua liabiliti yang timbul daripada pembekalan barangan oleh plaintif kepada MBN Consortium. Selepas gagal untuk mendapatkan pelangsaian penghakimannya terhadap MBN Consortium, perayu memulakan tindakan writ di mahkamah sesyen terhadap responden berdasarkan jaminan dan indemniti. Jumlah hutang penghakiman yang belum diselesaikan berserta dengan faedah terjumlah kepada lebih daripada RM786,000. Responden memohon untuk membatalkan tuntutan perayu dibawah A 18 k 19(1)(a), (b) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') yang dibenarkan atas alasan bahawa had masa telah bermula. Isu untuk diputuskan adalah: (a) sama ada hak untuk menyaman penjamin atau pemberi indemniti wujud; dan (b) sama ada tuntutan perayu dihalang oleh had masa.

Diputuskan, menolak rayuan dengan kos:

(1) Kewujudan kausa tindakan seorang peminjam terhadap seorang penjamin atau pemberi indemniti bergantung kepada penafsiran jaminan atau indemniti. Dalam keadaan dimana jaminan dan/atau

indemniti bukan satu jaminan atau indemniti atas tuntutan dan penjamin atau pemberi indemniti telah bersetuju: (a) untuk tanggungjawabnya untuk dihutang secara terus kepada peminjam sebagai pemiutang utama; dan (b) untuk tanggungjawabnya sama seperti peminjam, kausa tindakan terhadap penjamin atau pemberi indemniti wujud pada waktu yang sama dengan kausa tindakan terhadap peminjam (lihat perenggan 9 & 13).

(2) Sekiranya jaminan atau indemniti yang dinyatakan bergantung kepada satu tuntutan dibuat, dan tiada peruntukan kontrak untuk tanggunghawab dibawah jaminan atau indemniti sama dengan tanggungjawab peminjam, kausa tindakan hanya akan wujud apabila satu tuntutan telah dibuat terhadap penjamin atau pemberi indemniti (lihat perenggan 14).

(3) Defendan telah bersetuju untuk bertanggungan kepada plaintif seakan-akan dia merupakan pemiutang utama kepada plaintif, dan dia juga telah bersetuju bahawa tanggungannya sama dengan liabiliti dinyatakan sama seperti MBN Consortium, ini bermakna bahawa tempoh had masa terpakai kepada peminjam dan liabiliti MBN Consortium adalah sama (lihat perenggan 18).]

Cases referred to

AmBank (M) Bhd (formerly known as MBF Finance Bhd) v Glorious Holidays Sdn Bhd & Anor [2012] MLJU 90; [2012] 1 LNS 68, HC (folld)

Legislation referred to

Contracts Act 1950
Limitation Act 1953 s 6(1)(a)
Rules of Court 2012 O 18 rr 19(1)(a), (1)(b), (1)(d)

Chia Cheng Wee (Chia & Lee) for the appellant.
Aiden Chan Chee Yuan (CY Chan & Quake) for the respondent.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The appellant's claim against the respondent was struck out by the sessions court. It appealed against this decision. The appellant was the plaintiff in the court below, and the respondent the defendant. They will be referred to here as they were there.

A BACKGROUND

[2] The plaintiff case was as follows. It supplied concrete mix to a company known as MBN Consortium Sdn Bhd ('MBN Consortium'). MBN Consortium failed to settle debts owed to the plaintiff arising from the sale of those goods. The plaintiff commenced a suit against MBN Consortium in 2018 and obtained a judgment in default of appearance in October 2018.

[3] That judgment remained unsatisfied.

[4] The defendant had signed a guarantee and indemnity with the plaintiff in connection with the payment obligations of the MBN Consortium. The terms of this guarantee and indemnity provided, among others, that the defendant would guarantee the payment obligations of the MBN Consortium to the plaintiff and that it would indemnify the plaintiff against all liabilities arising from the supply of goods by the plaintiff to MBN Consortium.

[5] Having failed to obtain satisfaction of its judgment against MBN Consortium, the plaintiff then commenced a writ action at the sessions court on 4 September 2019 against the defendant, premised upon the guarantee and indemnity. The outstanding judgment debt together with interest stood at more than RM786,000.

[6] The defendant applied to strike out the plaintiff's claim under O 18 rr 19(1)(a), (b) and/or (d) of the Rules of Court 2012 on grounds that the plaintiff was barred by limitation. The sessions court judge hearing the matter allowed the striking out, on the basis that the plaintiff's cause of action had accrued against the defendant on 19 March 2013 and hence limitation had set in by 20 March 2019, some six months prior to the commencement of the suit.

[7] Having heard submissions and considered the applicable principles, I was of the view that the learned sessions court judge was entirely correct to have struck out the case, and I dismissed the plaintiff's appeal. The key and determinative question in this case was when the right to sue a surety or indemnity provider accrues, and the effect that a clause providing for the co-extensiveness of the liabilities of the surety or indemnity provider, and those of the borrower/obligor, on the reckoning of time for the purposes of limitation.

[8] The legal principles applicable to the present case are considered in the following paragraphs.

THE APPLICABLE PRINCIPLES

[9] The accrual of the cause of action of a lender (or, more accurately, an obligee) against a guarantor (referred to in the Contracts Act 1950 as a 'surety') or an indemnity provider depends on the proper construction of the guarantee or indemnity.

[10] In *AmBank (M) Bhd (formerly known as MBf Finance Bhd) v Glorious Holidays Sdn Bhd & Anor* [2012] MLJU 90; [2012] 1 LNS 68, the plaintiff bank sued its borrower and a director of the borrower, who had provided a guarantee to the bank in respect of the repayment obligations of the borrower. The bank obtained a judgment in default against the borrower, and summary judgment against the guarantor. The guarantor appealed to the Court of Appeal, which allowed his appeal and remitted the case for retrial. In so doing, the Court of Appeal posed two questions for determination by the High Court:

(a) in a situation where there is a principal debtor clause, when does the cause of action arise? and

(b) where payment is made after the sale of property charged on security, whether the cause of action against a guarantor as opposed to a chargor starts to run afresh after the sale.

[11] Mah Weng Kwai J found that the letter of guarantee signed by the guarantor was in fact and law a guarantee and indemnity. The guarantor had irrevocably guaranteed as principal debtor and not merely as surety to repay the loan together with interest and costs, in the event of a default in payment by the borrower. The guarantor had also agreed for his liability to the bank to be co-extensive with that of the borrower. The court also found that the letter of guarantee on its true construction was not an on-demand guarantee, and hence the bank possessed a right to sue the guarantor without any notice. This meant that the bank's right to sue both the borrower and the guarantor accrued when the borrower made its last repayment. Mah J stated:

> 6.16 In the case of *MS Fashion Ltd and Others v BCCI SA and Others* [1993] 2 Bank LR 128 (Ch D), it was held by Lord Justice Hoffmann that, inter alia, the 'principal debtor' clauses had the effect of creating primary liability for the purposes of the rule that the debt was not contingent upon demand. As already held by the court that the second defendant's liability was a primary liability as a principal debtor, there was thus no requirement for a demand to be made on the second defendant pursuant to the individual letter of guarantee. The letter of demand dated 29 April 2010 issued by the Plaintiff did not postpone the commencement of the limitation period from 29 November 1997 to 23 April 2010.

[12] He concluded in the following manner:

A 6.19 Thus, in answer to the two questions posed by the Court of Appeal, the court holds that in a situation where there is a principal debtor clause the cause of action against the second defendant arises immediately upon the default to pay by the first defendant and no demand on the second defendant is necessary. And in answer to the second question the court holds that where payment is made after the sale of property charged on security, the cause of action against a guarantor as opposed to a chargor does not start to run afresh after the sale particularly when the loan agreement specifically provides that the lender may proceed simultaneously with foreclosure proceedings and civil action for the recovery of the debt.

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C **[13]** Thus, in circumstances where:

(a) the guarantee and/or indemnity is not an on-demand guarantee or indemnity; and

(b) the guarantor or indemnity provider has agreed:

D (i) for his obligations to be directly owed to the lender as principal debtor; and

(ii) for his obligations to be co-extensive with those of the borrower,

E the cause of action against the guarantor or indemnity provider accrues simultaneously with the cause of action against the borrower.

[14] On the other hand and by extension, if the guarantee or indemnity is expressed to be contingent upon a demand being made, and there is no contractual stipulation for the obligations under the guarantee or indemnity to F be co-extensive with the obligations of the borrower, the cause of action would only accrue when a demand has been made against the guarantor or indemnity provider. In such circumstances, the obligee may first commence an action against the principal obligor. If he is not able to obtain satisfaction of his claim, then he may thereafter claim whatever outstanding amounts against the G guarantor or the indemnity provider (as the case may be), after first making a demand. His right to make a demand would accrue when the principal obligor first defaults under the loan. If the demand remains unsatisfied, he will then have six years from the date of demand to commence legal action, pursuant to s 6(1)(a) of the Limitation Act 1953.

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The contractual provisions in the present case

[15] The main operative provisions of the guarantee and indemnity are I cll 1 and 2, reproduced below:

1 GUARANTEE

I/We will:

1.1 pay to you on demand all moneys and liabilities whether certain now or hereafter owing and payable and remaining unpaid to you

by the Customer under and pursuant to the Facility (which monies and liabilities shall hereinafter be referred to as 'the indebtedness') which expression shall include the principal sum, interest thereon and all other moneys payable by the Customer to you under the Facility and all costs, charges and expenses on a full indemnity basis which you may incur in the preparation, enforcement and discharge of the Facility; and/or

1.2 immediately make good any default by the Customer in payment of any moneys covenanted to be paid under the Facility.

2 INDEMNITY

In addition to and not in derogation of the guarantee herein given, I/We will irrevocably and unconditionally indemnify you and your successors-in-title and assigns and persons deriving title under you or them against all losses, actions, proceedings, claims, demands, costs, damages and expenses (including your solicitor's costs on a full indemnity basis) and all other liabilities of whatsoever nature or description which you and your successors-in-title and assigns and persons deriving title under you or them may sustain by reason of your entering into the Facility or in relation to or arising out or in consequence of the Facility or resulting from any breach or non-performance or non-observance by the Customer of the obligations, terms, covenants and agreements to be performed and observed by the Customer and contained in the Facility.

[16] Clause 1 contains the guarantee clause, while cl 2 contains the indemnity. It can be seen that only the guarantee was expressed to be subject to a demand being made.

[17] The next clauses that are pertinent to the outcome of this case are cll 12 and 13:

12 PRINCIPAL DEBTOR

12.1 In order to give full effect to the provisions of this Guarantee and Indemnity, I/We hereby waive all rights inconsistent with such provisions and which I/we might otherwise as a surety/sureties be entitled to claim and enforce and you shall be at liberty to act as though I/we were a principal debtor(s) to you for the Indebtedness.

12.2 As a separate and independent stipulation, I/we hereby agree that all sums not recovered or recoverable from me/us on the basis of a guarantee, whether by reason or any legal limitation, disability or incapacity on or of the Customer or any other fact and circumstances whether known to you or not, shall nevertheless be recoverable from me/us as a principal debtor(s) and my/our liability under this Guarantee and Indemnity shall subsist whether or not you have a legal right to claim against the Customer for the Indebtedness.

13 CO-EXTENSIVE LIABILITY

My/our liability in respect of the Indebtedness aforesaid shall be co-extensive with the liability of the Customer for the same and you shall be entitled to recover from

me/us all sums payable by me/us under this Guarantee without fist availing of your legal remedies against the Customer and/or any other surety and/or against any security which you may now or at any time hereafter or from time to time have or hold from or against the Customer and/or any other surety or person.

[18] By these clauses, the defendant has agreed to be liable to the plaintiff as though he were a principal debtor to the plaintiff, and he has also agreed that his liability to the plaintiff would be co-extensive with the liability of MBN Consortium to the plaintiff. When the defendant's liability is expressed to be co-extensive with that of MBN Consortium, this meant that the period of limitation applicable to both the borrower's and MBN Consortium's liabilities would be identical. Of course, in this case, the defendant's obligation cl 1.1 was expressed to be subject to a demand being made. Reading cll 1.1 and 13 together, this meant that the defendant's liability under the guarantee (but not the indemnity under cl 2) was contingent upon a demand being first made, but that in all circumstances, limitation would set in after the lapse of six years from the date on which the cause of action first accrued against MBN Consortium, for the reason that the liabilities of MBN Consortium and the defendant were co-extensive.

[19] The ratio decidendi of the case of *AmBank (M) Bhd (formerly known as MBf Finance Bhd) v Glorious Holidays Sdn Bhd & Anor* applies to this case.

[20] On the facts of the present case, there had been a failure by MBN Consortium to make any payment after 19 March 2013 in respect of the facility provided to it by the plaintiff. This meant that the plaintiff's causes of action against both MBN Consortium and the defendant accrued on this date, and would have expired six years thereafter. The plaintiff was not out of time when it sued MBN Consortium, but by the time the suit was commenced against the defendant, limitation had set in some 168 days prior, on 20 March 2019.

[21] In my judgment, the learned sessions court judge was thus entirely correct to have struck out the plaintiff's case. The appeal was accordingly dismissed with costs.

Appeal dismissed with costs.

Reported by Izzat Fauzan